

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-6080

To be argued by
MILTON S. GOULD

**United States Court of Appeals
For The Second Circuit**

UNITED STATES OF AMERICA,
Plaintiff-Respondent,
against

INTERNATIONAL TELEPHONE AND TELEGRAPH COR-
PORATION and THE HARTFORD FIRE INSURANCE
COMPANY,

Defendants-Respondents,

and

AVIS, INC.,

*Defendant-Intervenor-
Respondent.*

ON APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

**BRIEF FOR PROPOSED
INTERVENOR-APPELLANT**

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PRELIMINARY STATEMENT

This brief is submitted on behalf of proposed intervenor-appellant Fuqua Industries, Inc. ("Fuqua"). Fuqua appeals pursuant to 28 U.S.C. §§ 1291, 1292(a)(1) from each and every part of an Order of the Honorable M. Joseph Blumenfeld of the United States District Court for the District of Connecticut, dated May 23, 1977, denying, inter alia, the motion of Fuqua

(1) to intervene in the proceedings herein;

(2) with respect to the matters contained in proposals 1, 2 and 3 listed in the Notice of Annual Meeting of Stockholders of Avis Inc. ("Avis") dated May 4, 1977 ("Notice"), to enjoin Richard Joyce Smith as Trustee pursuant to an Order of the District Court dated January 6, 1975 (the "Trustee") and defendant-intervenor Avis from (i) voting any shares of Avis common stock at the annual meeting of Avis stockholders held on May 25, 1977 (the "Annual Meeting"), and (ii) soliciting any proxies with respect thereto;

(3) to enjoin Avis from holding the annual meeting of its stockholders, or any other meeting of its stockholders, to vote upon the matters contained in proposals 1, 2 and 3 as set forth in said Notice until further order of the Court; and

(4) to grant such other and further relief as to the Court seemed just and proper.

ISSUES PRESENTED FOR REVIEW

1. Was the District Court's denial of Fuqua's motion to intervene erroneous?

2. Is this Court warranted in exercising its plenary jurisdiction in view of the changed circumstances of this case and should the order of the district court dated January 14, 1976, entitled "Trustee Order No. 3", be amended?

3. Should the Trustee be enjoined from proceeding with a proposed secondary offering of his shares to the public?

Fuqua respectfully submits that this Court should order that Fuqua's motion to intervene be granted; that Trustee Order No. 3 should be amended to permit sale of the Trust Property to Fuqua, or alternatively that this matter be remanded to the District Court for an evidentiary hearing as to whether Trustee Order No. 3 should be amended; and that the proposed secondary offering should be enjoined.

STATEMENT OF FACTS

A. Events Leading to Trustee Order No. 3

The District Court in a Final Judgment herein dated September 24, 1971, ordered and directed that the defendant, International Telephone and Telegraph Corporation ("ITT"), divest within three years all of its interest in defendant intervenor Avis, along with its interest in certain other corporations (279a-296a).^{*} Pursuant to said order, ITT divested itself of some but not all of its interest in Avis in two public offerings of Avis stock.

^{*} Numbers in parentheses followed by "a" refer to the appendix.

Avis and the Trustee have in oral argument stated that representations made by ITT in the course of the public offerings described above preclude sale of its stock (now held by the Trustee) to a single third party rather than through public offerings. However, the prospectus for the first public offering by ITT dated June 21, 1972 contains the following language:

"Under the terms of a consent decree (the "Decree"), ITT is obligated, subject to the conditions of the Decree, to divest itself of all its ownership interest in certain subsidiaries, including Avis, prior to September 24, 1974. The offering of the shares hereunder is the first step to implement the divestiture of Avis. ITT expects to divest the remaining Avis shares owned by it pursuant to subsequent public offerings or private sales, on terms to be negotiated by ITT in connection with such offerings or sales, which may differ from the terms of the offerings described herein."

(emphasis supplied). The prospectus for the second public offering by ITT also contained the italicized language quoted above.* No purchaser in the ITT public offerings could therefore have been under the impression that the remainder of ITT's stock would likewise necessarily be sold through public offerings. In any event, ITT possessed no authority to bind the courts and the Trustee as to the manner in which divestiture would ultimately be accomplished.

As ITT, despite the public offerings described above, failed to divest itself of its interest in Avis within three years of the final judgment herein, in an order dated January 6, 1975, entitled "Trustee Order No. 1" (317a-321a) the District Court appointed the Trustee to manage and dispose of ITT's undivested in-

* This language was also contained in the prospectus for the first public offering by the Trustee.

terest in Avis (the "Trust Property").* The Trustee subsequently filed with the Court a "Second Report pursuant to Trustee Order No. 1" dated March 3, 1975 (the "Second Report"; 322a-331a). In the Second Report, the Trustee described three offers he had received for purchase of the Trust Property and his reasons for rejecting them:

"To choose the alternative of a private sale of the Trust Property at this time at current market values would be extremely disadvantageous for the existing public shareholders of Avis. To date the only offers received have been two tentative proposals for purchase of the Trust Property at six to seven dollars a share on a basis which forces minority shareholders out at the same price.

"A third tentative proposal provides for the purchase by a private group of \$25,000,000 principal amount of debentures of Avis due no earlier than 1987 and convertible over a period of five years into Avis Common Stock at \$6.00 per share. The proposal is conditioned on the agreement by the Trustee to grant a five year option to Avis to purchase the Avis shares held by the Trustee at \$6.00 per share plus one-half of the amount by which the market price at the time of exercise might exceed \$6.00. The shares optioned would be used for employee stock purchase and bonus plans, and to the extent not so utilized, the remainder would be offered to shareholders. At the end of the option period I would have to sell any Avis shares that I then held to this group at the lower of \$6.00 per share or the then market price. I do not consider such a proposal feasible for various reasons. It would involve too long a delay in termination of the Trust, too great a dilution of Avis common stock and an unfair advantage to the initiating group."

* This Order was in conformity with the Final Judgment of September 24, 1971.

By order dated January 14, 1976, entitled "Trustee Order No. 3," the District Court stated that the Second Report of the Trustee had been accepted and approved (91a). Trustee Order No. 3 further stated that the Trustee had advised the Court that he had not, as of the date of the Order, received any firm offer for the purchase of the Trust Property and was not then engaged in any negotiations with any party which would lead to such an offer. With regard to further divestiture of the Trust Property, Trustee Order No. 3 directed the Trustee:

" * * * to begin the disposition of the Trust Property by way of a series of public offerings beginning in the first half of 1976 and continuing from time to time thereafter." (93a).

In his Third Report dated June 7, 1976, the Trustee stated that on May 27, 1976, a public offering of 1,250,000 shares of Avis common stock, constituting a portion of the Trust Property, was made at a price of \$9.25 per share, less an underwriting discount of \$.65 per share, and that by virtue of this transaction, and an exchange of preferred shares held by the Trustee for shares of common stock, the Trustee, as of the date of his Third Report, held 3,743,504 shares of Avis common stock, constituting approximately 47% of the total outstanding shares (332a-333a).

B. The Avis Proxy Statement

The Notice of Annual Meeting of Avis stockholders (the "Notice") to be held on May 25, 1977 stated that it would be held for the following purposes (the "Proposals"):

"(1) To elect twelve (12) directors of the Company to hold office for terms of one to three years and until their respective successors shall have been elected and shall have qualified or, if Item (2) is not approved, until the next Annual Meeting of Stockholders and until their respective successors shall have been elected and shall have qualified;

"(2) To act upon a proposal to amend the By-laws of the Company to provide for the division of the Board of Directors into three classes, the terms of which expire at successive Annual Meetings of Stockholders, to provide that directors may be removed from office only for cause and to increase the number of directors required to constitute a quorum to a majority of the entire Board, and to amend the Certificate of Incorporation of the Company to require a special stockholder vote to amend the foregoing By-law provisions;

"(3) If the proposal described in Item (2) is approved, to act upon a proposal to amend the Certificate of Incorporation of the Company to require a special director or stockholder vote for certain mergers, consolidations and similar transactions under specified circumstances and for any alteration or repeal of such provisions;"

together with the election of auditors and such other business as might properly come before the meeting.

Proposal (2) provides for staggered terms for members of the board of directors. Should this Court or the District Court finally determine that the Trust Property may be sold in a private transaction Proposal (2) will necessitate at least two annual meetings of stockholders of Avis for the purchaser of the 3,743,504 shares to elect a majority of the board of directors and thus have a voice in the management of Avis. Moreover, the Trustee is in the class of directors whose terms expire in 1980. His law partner, Robert C. O'Brien, is in the

class of directors whose terms expire in 1978 (P 243a).* Proposal (3) provides that mergers, consolidations, sales of assets, stock issuances and similar transactions must be approved by 80% of the outstanding shares of Avis unless approved by a two-thirds vote of the directors. With regard to the effect of Proposals (2) and (3), the proxy statement states:

"The proposed amendments of the Company's Certificate of Incorporation and By-laws are intended, in general, to make more difficult, and therefore discourage, attempts by others to acquire control of the Company, through acquisitions of stock or otherwise, in transactions not approved by the Company's Board of Directors. Neither the Company nor the Trustee is aware of any pending or proposed transaction that would be affected by the proposed amendments." (P 245a).

The proxy statement is dated May 4, 1977. The sole evidence as to when the stockholders of Avis received the statement is the affidavit of Robert Prather ("Prather") in which he states that he received it on May 12, 1977 (P 29a) and an affidavit by a member of an investment banking firm that his firm had received proxy material for shares held in its name on May 16, only after requesting it (150a).** The proposals to be submitted at the Annual Meeting were not published in The Wall Street Journal until May 12 (145a).

* Numbers in parentheses preceded by "P" and followed by "a" refer to the appendix in Prather v. Avis, et al., Docket No. 77-7240.

** Avis' president in an affidavit merely stated that the proxy statement was "circulated" on May 4 (63a).

Subsequently, Prather, a Vice President of Fuqua, initiated an action pursuant to Section 14(a) of the Exchange Act in his capacity as an Avis stockholder* (the "Prather action"). The amended complaint in the Prather action alleges that the proxy statement was and is false and misleading in that it misrepresents and omits material facts as to which there is a substantial likelihood that a reasonable stockholder of Avis would consider important in deciding how to vote on the proposals submitted to the stockholders of Avis at the Annual Meeting. A separate class action alleging that the proxy statement was false and misleading, that the Trustee has perpetrated a fraud upon and has violated his fiduciary duty to the public stockholders of Avis, and asserting a derivative action on behalf of Avis (the "Miller action") has been commenced by an Avis stockholder having no connection with Fuqua.

(1) The Proposed Secondary Offering by the Trustee

On May 17, 1977, Avis filed a registration statement for a proposed secondary offering of two million shares of its common stock with the Securities and Exchange Commission ("SEC"). The selling shareholder is to be the Trustee (75a). The proposed secondary offering will reduce the percentage of Avis common stock

* Counsel for Avis stated in oral argument before the District Court:

"It was Fuqua who knew that he was interested in this corporation back in 1972 when he put up Prather to buying one share so he could get all the dope on it as the years went by." (231a)

In fact, no evidence was presented to the court below that Fuqua "put up" Prather to buying his Avis stock.

stock held by the Trustee from approximately 47% to approximately 22%. The proxy statement fails to disclose the registration of the proposed secondary offering by the Trustee or the incipency of such offering, but merely states:

"The Company has been advised by the Trustee that he currently intends to dispose of the remaining common stock of the Company held by him . . . by means of additional public offerings from time to time" (P 241a, emphasis supplied).

Yet, on March 25, 1977, an article in The Wall Street Journal stated:

"Colin M. Marshall, president and chief executive officer of Avis Inc., met with a group of securities analysts at a midtown club yesterday morning, and told them the company's court-appointed trustee intends to go ahead with a public offering of Avis stock 'around the middle of this year'.

* * *

"Robert C. O'Brien, an Avis director and law partner of the court trustee, told the analysts' group yesterday that the trustee plans to sell half the shares in June, 'depending on market conditions'.

* * *

"Mr. Marshall told the analysts yesterday he couldn't comment on earnings as the company considered itself in registration because of the trustee's plans."

(p. 13). As the proxy statement is dated May 4, 1977, the omission of a reference to the proposed secondary offering was a willful attempt by Avis and the Trustee to conceal this material fact from the stockholders in soliciting proxies.

Further, incredibly in view of The Wall Street Journal article of March 25, 1977, counsel for Avis stated in oral

argument before Judge Blumenfeld:

"Another terrible sin that we committed: on May 4th we did not reveal the fact that on May 16th we would file a registration statement.

"Of course not. On May 4th we hadn't decided to file the registration statement. Sure, we were thinking about it, and that we told the world in the proxy material. That is to say we told them that the Trustee was bent on disposing of the stock in orderly fashion.

"If we had said more than that, if we had predicted, prophesied, then we would really be in the ring [sic]."

(228a). Thus, while on March 24, the president of Avis stated that he considered Avis in registration due to the proposed secondary offering, counsel for Avis represented to the District Court that as of May 4 Avis "hadn't decided to file the registration statement." Manifestly while on May 4 Avis could perhaps not provide its stockholders with the exact date of the registration of the proposed secondary offering, it could advise them of its imminence in at least as much detail as was provided to security analysts on March 24.

(2) Connection between the Proposals and the Secondary Offering

A further material omission in both the proxy statement and a subsequent Supplement (see discussion infra) is the connection between the Proposals presented at the Annual Meeting and the secondary offering. Counsel for the Trustee stated in oral argument before the District Court:

"Finally, any delay with respect to the acting upon the provisions that will be before

the meeting on Wednesday and implementing those would probably cause the Trustee to be required to withdraw the registration statement now pending for the sale of two million shares."

(246a-247a). The Avis stockholders were never told that the Trustee would probably withdraw the secondary offering if there were any delay in enacting the Proposals. Such fact was material because it clearly demonstrates the interest of the Trustee in enacting the Proposals. With the Proposals enacted, the Trustee may maintain control of Avis through his board of directors through at least two annual meetings. He will maintain such control even after he has reduced his holdings of Avis common stock to 22% through the proposed secondary offering. By the terms of Proposal (3) any holder of more than 20% of Avis' common stock will be able to veto any change in control of Avis not approved by two-thirds of the directors. However, were the Proposals not enacted, the Trustee intended to withdraw the secondary offering, thereby maintaining his control of Avis through the 47% of the common stock he now holds.

(3) Compensation of the Trustee and Whitman & Ransom

The proxy statement failed to disclose the compensation paid to the Trustee. A subsequent Supplement to the proxy statement (see discussion infra) revealed that since the time of his appointment, the Trustee has received \$100,000 in fees.

The Trustee is a member of the law firm of Whitman & Ransom which serves as his counsel. Robert O'Brien ("O'Brien"), a member of the board of directors of Avis, is also a member of

Whitman & Ransom. The proxy statement failed to disclose the compensation paid to Whitman & Ransom. The subsequent Supplement to the proxy statement disclosed that Whitman & Ransom has received fees in the amount of \$220,000 for its representation of the Trustee. (54a).

Avis and the Trustee have contended that the compensation received by the Trustee and Whitman & Ransom is not material because such fees are paid by ITT rather than Avis. However, plaintiffs in the Prather and Miller actions contend that, regardless of the source of the payments, the fact of the payments gives the Trustee and O'Brien an interest in discouraging offers to purchase the Trust Property as a block. Since the Proposals presented at the Annual Meeting are concededly designed to discourage attempts to acquire control positions in Avis, the Prather and Miller plaintiffs contend that the Trustee's and O'Brien's interest in discouraging such attempts should have been disclosed in the proxy statement.

(4) Control of the Avis Board by the Trustee

With regard to proposals (2) and (3), the proxy statement states:

"The Board of Directors believes that, with the Board consisting at present almost entirely of persons who are not officers or employees of the Company, it is unlikely that the amendments would result in perpetuation of the Company's present officers under circumstances detrimental to the stockholders, although stockholders should consider that the Board's determination with respect to takeover bids might be influenced by directors' self-interest in remaining directors of the Company.

"The Board of Directors has concluded that the potential benefits of the proposed

amendments outweigh any possible disadvantages thereof and the Board of Directors unanimously recommends approval of the proposals described below."

(P 246a). However, the proxy statement does not disclose that the Trustee, as holder of 47% of the common stock of Avis, effectively controls the Board of Directors. The proxy statement does state (P 242a) that "The Trustee currently may be deemed to 'control' the Company within the meaning of the rules and regulations promulgated under the Securities Exchange Act of 1934, as amended." The Prather and Miller plaintiffs contend that this language does not adequately convey the actual control exercised by the Trustee over the Avis board.

(5) Failure to Adequately Disclose the Effects of the Proposals

With regard to Proposals (2) and (3), the proxy statement states that "These proposals could deter a change in the management or control of the Company that would be advantageous to the Company and its stockholders" and further that "Tender offers or other acquisitions of stock for the purpose of acquiring control of the Board of Directors could be discouraged . . ."

(P 246a). With regard to Proposal (3), the Proxy Statement states that:

"The effect of the proposed amendments described above could be to discourage a tender offer or takeover bid by a corporation, person or entity intending to acquire control of the Company through the acquisition of a substantial number of shares of the Company's stock. . . . The proposed amendment would make it more difficult to effect such a transactions and might therefore discourage an attempt to do so."

(P 250a). The Miller and Prather plaintiffs contend that the above quoted statements are false and misleading in that tender offers and other changes of control in Avis, in particular the Fuqua offer to the Trustee and stockholders (see discussion infra), will in fact be discouraged by adoption of the Proposals.

C. The Fuqua Offer

Fuqua is a diversified manufacturing and distribution and service company, the shares of which are listed on the New York Stock Exchange. In 1976, Fuqua had sales of \$535 million and net income of approximately \$13.6 million. Manufactured and distributed products include lawn and garden equipment sold under the "Snapper" and "Comet" brand names and a wide variety of sporting goods sold under the "Hutch", "Reach", "Ajay" and "Ebonite" brand names. Fuqua's service operations include an entertainment segment containing a large theatre circuit, broadcast properties (both TV and radio) and a photo-finishing company (Colorcraft) located throughout the midwest and Atlantic states. Fuqua also operates a large trucking firm (Interstate Motor Freight) with routes throughout the midwest and North Eastern parts of the United States and from Quebec to Vancouver in Canada (20a).

Fuqua's officers did not learn of the Proposals to be presented at the Avis Annual Meeting until May 12 by means of an announcement in The Wall Street Journal (145a).^{*} The Trustee and Avis have sought to charge Fuqua with "laches" due to its alleged

^{*} As noted above, Prather, a Vice President of Fuqua, did not receive the Avis proxy statement until May 12 (P 29a).

delay in presenting its offer to purchase the Trust Property. However absent the extraordinary and unanticipated Proposals presented at the Annual Meeting which effectively lock in the present directors and management of Avis for a two-year period, there was absolutely no urgency in making an offer to purchase the Trust Property. These Proposals were not public knowledge until May 12. Thus, the bringing on of the instant application in the week prior to the Annual Meeting was necessitated by the decision by the Trustee and the directors of Avis to present the extraordinary lock in Proposals to the Annual Meeting and then to delay public announcement of the Proposals until May 12. Fuqua cannot be required to have anticipated the sudden and unexpected attempt by Avis and the Trustee to absolutely preclude changes in management of Avis and cannot be charged with any alleged "delay" resulting therefrom.*

Following public announcement of the Proposals in The Wall Street Journal on May 12, the Fuqua board of directors approved an offer to purchase the Trust Property on May 14 (145a). On May 17, a letter from counsel to Fuqua was delivered to the Trustee which stated in part as follows:

* Further, as discussed below, the position of the Trustee is that since signature of Trustee Order No. 3 on January 14, 1976, he is precluded from even considering offers to purchase the Trust Property outside of a public distribution. Thus, even had Fuqua made an offer, at an earlier date, the Trustee would have summarily rejected it. Finally, assuming delay can somehow be attributed to Fuqua, it manifestly cannot be attributed (as Judge Blumenfeld appeared to) to Prather and certainly not to Miller, who has absolutely no connection with Fuqua.

"We wish to advise that Fuqua intends to make an offer to purchase for cash all of the 3,743,504 shares, or approximately 47%, of Avis, Inc.'s ("Avis") common stock held by you as Trustee for International Telephone & Telegraph Corp. ("ITT"). From a reading of Avis' announcement in the Wall Street Journal on May 12, 1977, and the Avis Proxy Statement dated May 4, 1977, it appears that your proposal as Trustee that Avis stockholders consider procedures designed to discourage acquisition attempts would have the effect of discouraging even an offer such as that of our client; should the proposal be adopted, Fuqua would not be interested in purchasing the 47% block. We urge that you join us in our request that the Board delay the Avis Annual Meeting of Stockholders or that you not vote your shares at such meeting until the court has passed upon our application as described hereinafter, because the adoption of the proposal may frustrate the ability of ITT to receive the best available offer for its Avis shares."

(99a). On May 18, the Trustee replied in a letter which stated that pursuant to orders of the District Court, he would proceed with the public distribution, would vote in favor of the Proposals, and would not request that the Annual Meeting be delayed (102a).

In its subsequent application to the District Court, Fuqua stated that if permitted to intervene in this action, it would seek amendment of Trustee Order No. 3 in order to enable it to purchase the Trust Property at a cash price of \$15.50 a share. This offer is at a price which is \$1.624 per share (and \$6,079,450 for the aggregate Trust Property) above the market value of Avis' common stock as of the close of business on May 16, 1977 and \$1.24 per share (and \$4,641,945 for the aggregate Trust Property) above its book value per share as of December 31, 1976 (139a). Further

the value of the common stock received by the public stockholders of Avis would have a per share value at least equivalent to the price per share paid to the Trustee for the Trust Property (22a).

Thus, under the Fuqua offer, a premium over market and book value would be paid not only to the Trustee but also to the public stockholders of Avis. Further ITT's divestiture of the Avis shares would be completed upon such purchase; there would not be any delay in the termination of the Trust (indeed, upon completion of the sale, the Trust would terminate, together with its attendant expenses); none of the minority stockholders of Avis would be required or compelled to sell their shares and Avis would no longer be subject to the vagaries of the sale or sales of 47% of its outstanding common stock. See generally Point II infra.

D. Initial Application to the District Court

On May 18, Fuqua presented an order to show cause to Judge Blumenfeld. Said application sought an order granting the relief set forth at pp. 1-2 supra. Annexed to the Fuqua application was a proposed complaint to be served and filed should its motion to intervene be granted. The proposed complaint sought the following relief:

(1) that Trustee Order No. 3 be amended to permit the sale of 3,743,504 shares of Avis common stock currently held by the Trustee to Fuqua for cash at a price of \$15.50 per share;

(2) that with respect to the matters contained in

proposals 1, 2 and 3 listed in the Notice, a preliminary and permanent injunction issue enjoining the Trustee and Avis from (i) voting any shares of Avis common stock at the forthcoming annual meeting of Avis stockholders, and (ii) soliciting any proxies with respect thereto;

(3) that a preliminary and permanent injunction issue enjoining Avis from submitting the matters contained in proposals (1), (2) and (3) in the Notice to the stockholders subject to the further order of the District Court; and

(4) for such other and further relief as to the District Court seems just and proper.

On May 18, Prather also presented an order to show cause in which he sought an order enjoining the Trustee and Avis from voting any shares of Avis common stock or soliciting proxies and enjoining Avis from holding the annual meeting of its stockholders until the material misrepresentations and omissions in the proxy statement for said meeting were corrected (P12a-P13a). Prather's annexed complaint seeks a permanent injunction, and in the alternative, a judgment declaring illegal and void and setting aside the voting of proxies by Avis at the Annual Meeting and enjoining defendants from taking any action to implement or carry out any resolution or decisions authorized or voted upon at the Annual Meeting (P28a).

Judge Blumenfeld set the Fuqua and Prather applications down for a hearing on May 23. Further on May 18, Fuqua learned for the first time of the proposed secondary offering

by announcement of the filing of its registration statement in The Wall Street Journal.

On May 20, the Miller application was presented to Judge Blumenfeld. The Miller order to show cause sought relief similar to that sought in Prather but in addition Miller sought to intervene in the instant action (United States v. ITT), and to enjoin the Trustee from commencing and effectuating the proposed secondary offering (M 22a).^{*} Judge Blumenfeld also set the Miller application down for hearing on May 23. However, he crossed out at the time of presentation of the order on May 18, Miller's application to intervene in United States v. ITT and to enjoin the Trustee from proceeding with the proposed secondary offering (M 22a). Thus, these applications by Miller were not heard at the May 23 hearing. Further, as noted above, the Miller complaint alleges violations of fiduciary duty by the Trustee and asserts a derivative claim on behalf of Avis, as well as alleging violations of the proxy rules. Judge Blumenfeld further modified the order presented to him by specifying that at the May 23 hearing, Miller could only assert violations of the proxy rules and could not assert his other claims (M 21a).

E. The Alleged Corrective Statement

Following the commencement of the instant application and the Prather action, a Supplement to Proxy Statement (the "Supplement"; 53a-54a) was allegedly mailed to Avis' stockhold-

^{*} Numbers in parentheses preceded by "M" and followed by "a" refer to the appendix in the Miller action.

ers on May 19 (50a). The Supplement discusses the instant application, the Prather action, the above quoted response of the Trustee to the Fuqua offer, and the compensation paid to the Trustee and Whitman & Ransom. It does not discuss the connection between the secondary offering and the Proposals presented at the Annual Meeting.

Even assuming that the information contained in the Supplement adequately corrected the misstatements and omissions in the initial Proxy Statement, absolutely no showing has been made by Avis that any stockholder could conceivably have received the Supplement and revoked his proxy by mail in the period between the alleged mailing (May 19) and the date of the scheduled meeting (May 25, after an intervening weekend).

Despite ready access to its stockholder list, Avis has presented no evidence with respect to where the Avis stockholders live, the number of days it takes for a mailing to reach them, and the number of days for the return of any communication from them to the company. No showing was made as to the number of Avis shares held by brokers. Brokers necessarily after receiving the Supplement had to mail it to the beneficial owners. Thus, those stockholders whose shares are held by brokers, undoubtedly did not even receive the Supplement by May 25, much less have time to consider and act on the information contained therein prior to the Annual Meeting.

The sole evidence as to receipt of the Supplement was presented not by Avis but by Fuqua and Prather. Fuqua presented an affidavit from a partner of the investment banking firm of

Bear, Stearns & Co. ("Bear Stearns") that stated that Bear Stearns did not receive the Supplement until May 23 by a hand delivery. Labels for the holders of 75,440 shares of Avis stock would then have to be prepared, with the result that the Supplement was not mailed to these stockholders until May 24 (150a). Prather stated that he had not received the Supplement as of May 20 (30a).

F. Hearing before the District Court
and Initial Hearing before this Court

On May 23 an argument was held before Judge Blumenfeld following which he denied the applications of Fuqua, Prather and Miller (modified, as noted above). On May 24, following an argument, this Court denied Fuqua's, Prather's, and Miller's applications for a stay of the Annual Meeting pending appeal without prejudice to the merits of the appeal. Applications for an expedited appeal were granted. At the argument before this Court, counsel for Avis and the Trustee estimated that the secondary offering would take place between the middle and the end of June.

G. The Annual Meeting

On May 26 The Wall Street Journal reported that the Annual Meeting of Avis stockholders was held on May 25. At said meeting 72% of the shares eligible to vote approved Proposal (2) providing for staggered terms for the Avis board. Sixty-three percent of the eligible shares approved Proposal (3) which enables a

holder of 20% of the Avis shares to block a merger or other change in control unless two-thirds of the board of directors approves.*

Counsel for Avis stated in oral argument that after the Annual Meeting, Fuqua "can come back [with its offer] and he'll [sic] be just as welcome as he [sic] was initially" (248a). Yet as set forth below, the Trustee has refused to even consider the Fuqua offer. Thus, unless this Court acts, the secondary offering will take place, and the Trustee and present management will be locked in for a two-year period. Fuqua's offer and others like it will be absolutely foreclosed. For the reasons set forth below, such foreclosure would be to the irreparable injury of Avis, its stockholders, and the beneficial owner of the Trust Property, ITT.

* Thus, less than half of the shares held by the public (apart from those held by the Trustee) were voted in favor of the Proposals.

ARGUMENT

POINT I

THE DISTRICT COURT'S DECISION TO DENY FUQUA THE RIGHT TO INTERVENE HEREIN WAS ERRONEOUS

As a threshold matter, an order denying intervention, either as of right or permissively, is final and appealable under 28 U.S.C. § 1291. See 9 Moore's Federal Practice, ¶110.13[7], p. 181. As stated therein, if intervention is available as of right, appellate review extends to questions of interest, possibility of its impairment and adequacy of representation. If intervention is sought permissively, then the question upon review is whether the lower court abused its discretion in denying intervention.

A. Intervention as of Right Is Warranted Herein

At present, the within action is, in effect, a court administered proceeding for ITT's divestiture of its equity holdings in certain companies. As part of that proceeding and pursuant to Trustee Order No. 3, the Trustee has been directed to dispose of the Trust Property by a series of public offerings. Fuqua has offered to purchase the Trust Property at a cash price of \$15.50 per share. Without a modification of Trustee Order No. 3, Fuqua will be unable to purchase the Trust Property and thus, it seeks to intervene herein. Further, Fuqua seeks to enjoin the Trustee's currently proposed secondary offering of

two million shares of Avis stock, which combined with the enactment of anti-takeover proposals at the Avis Annual Meeting makes it, as a practical matter, impossible for Fuqua to purchase Avis.

Under such circumstances it is clear that Fuqua, with a direct and substantial stake in the manner in which ITT divests its Avis shares, satisfies the statutory test for intervention as of right.

The logical starting point for an analysis of Fuqua's motion to intervene is Fed. R. Civ. P. 24. Rule 24(a)(2) creates a four-fold test for intervention of right. An absentee shall be permitted to intervene if (1) his application is timely; (2) he claims an interest relating to the property or transaction that is the subject of the action; and (3) he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless (4) his interest is adequately represented by existing parties.

It is respectfully submitted that Fuqua made a sufficient showing in the District Court of each of the four necessary requirements of this test for intervention of right.

Timeliness

The District Court held that Fuqua's application to intervene was not timely. Its rationale was that "[t]his case has been going on for several years" and that "[t]he order which [Fuqua] now challenge[s] has [sic] been issued several years ago" (266a).

Initially, the District Court's decision was predicated on an erroneous finding of fact. Fuqua seeks the modification of Trustee Order No. 3, which directs the Trustee to sell the Trust Property in a series of public distributions (93a). This order was signed on January 14, 1976. Accordingly, the challenged order is not, as the District Court found, several years old.

Second, the District Court ignored well established tests for judging whether an application for intervention is timely. The lower Court was not mindful of the fact that where, as here, the applicant may intervene as of right, and thus may be seriously prejudiced if not permitted to do so, the Court will find an application untimely with great reluctance. Diaz v. Southern Drilling Corp., 427 F.2d 1118 (5th Cir. 1970), cert. denied, 400 U.S. 878 (1970).

Also, whether an application for intervention is timely does not depend, as Judge Blumenfeld found, solely upon the amount of time that may have elapsed since the institution of the action. Smith Petroleum Service Inc. v. Monsanto Chemical Co., 420 F.2d 1103 (5th Cir. 1970). Rather, timeliness depends on the way in which any party might be prejudiced by the delay caused by the application. As was stated by the court in Diaz v. Southern Drilling Corp., supra (p.1126):

"Furthermore, the more important question is not the mere length of time but the possibility of prejudice to existing parties that the delay may cause. This consideration is to be evaluated against the liberal treatment that is to be accorded applications for intervention of right; such applications 'may well be granted at a time in the suit when

it would be wise to deny permissive intervention.' J. Moore, *supra* at ¶24.13[1]."

The District Court held that Fuqua's application was untimely without a finding that any party would be prejudiced by the proposed intervenor's failure to apply sooner. And, this is the most important consideration in determining timeliness.

McDonald v. E. J. Lavino Company, 430 F.2d 1065 (5th Cir. 1970).

Indeed, as stated more fully above and in Point II, infra, Fuqua's intervention herein and the modification of Trustee Order No. 3 are in all parties' interest and will not delay the ultimate disposition of the Trust Property. The District Court, therefore, abused its discretion in not considering these factors.

The timeliness of intervention must be judged from the time when intervention is first appropriate. Walpert v. Bart, 44 F.R.D. 359 (D. C. Ind. 1968); Diaz v. Southern Drilling Corp., *supra*. The Court must look at the purpose for which intervention is sought. Hodgson v. United Mine Workers of America, 473 F.2d 118 (C.A.D.C. 1972). In the instant case, Fuqua is not intervening to reopen or relitigate any issue that has previously been determined by the District Court in the basic anti-trust action. Were this the case, the date the lawsuit was commenced would be relevant. Fuqua, however, is merely intervening for the limited purpose of asserting an interest in the Trust Property, which has yet to be divested pursuant to the judgment herein. It has been uniformly held that where the applicant seeks intervention to protect his interest in a fund under the

aegis of the court, intervention is timely at any time before the distribution of the fund, even after judgment. Lalic v. Chicago, Burlington & Quincy Railroad Co., 263 F. Supp. 987 (N. D. Ill. 1967); McDonald v. E. J. Lavino Co., supra.

Under the circumstances of this case, it makes no sense for the District Court to have judged the timeliness of Fuqua's application by reference to the commencement of the lawsuit. The relevant time to assess the timeliness of the application must be viewed as May 12, 1977, when Fuqua learned that Proposals (1) through (3) would be voted upon by the Avis shareholders at their Annual Meeting. For then, for the first time, the need to intervene and protect its interest in the Trust Property became manifest.

The "Interest" Requirement

The District Court committed an error of law in holding that Fuqua failed to show the requisite "interest" for purposes of Rule 24(a)(2). The Court stated that Fuqua "has no right to demand that the Trustee sell the shares to him" (267a), in effect, holding incorrectly that "interest" means "legal interest."

The decision in Cascade National Gas Corporation v. El Paso Natural Gas Company, 386 U.S. 129 (1967), is directly on point. In that case, the Supreme Court directed that upon remand, the District Court supervise El Paso Natural Gas Company's divestiture of the Pacific Northwest Pipeline Corporation, whose acquisition by El Paso was found to have violated § 7 of the Clayton Act. Following remand, leave to intervene was unsuccessfully sought by the State of California, by Southern

California Edison and by Cascade Natural Gas, whose sole supplier of natural gas was Pacific Northwest. After noting that Rule 24(a)(2) applies to further proceedings in pending actions, such as divestiture proceedings in anti-trust lawsuits (386 U.S. at 135-6), the Court held that all three applicants could intervene as of right.

In the case of Cascade's application to intervene, the Court had cause to discuss the concept of "interest" as it applies to Rule 24(a)(2). The Court held that Cascade could intervene as of right since it had a substantial economic interest in seeing that the divestiture decree made its sole supplier a viable enterprise and, the formulation of the decree of divestiture was the only forum in which that interest could be asserted. Id.

The clear interdict of the Supreme Court's decision in Cascade is that a substantial, direct pecuniary interest in a plan of divestiture, such as Fuqua's interest in the case at bar, suffices to meet the "interest" test embodied in Rule 24(a)(2). An applicant seeking intervention need not necessarily show that it has a "legal" or "equitable" interest in the property that is the subject of the action. Rather, it may demonstrate that it would be substantially affected in a practical sense by the determination in the action.

Judge Blumenfeld completely misinterpreted the thrust of the Supreme Court's decision in Cascade when he stated that Cascade would control here if Fuqua were interested in purchasing Avis cars (266a). Thus, the District Court apparently be-

lieved that intervention was there allowed only because of the substantial economic interest of a purchaser in its supplier. It is respectfully submitted that Cascade is not susceptible to such a narrow reading and its rule may be invoked whenever a proposed intervenor has a substantial pecuniary interest in the subject matter before the Court.

This pragmatic interpretation of the "interest" test can also be observed in Hobson v. Hansen, 44 F.R.D. 18 (D.C.D.C. 1968). As the following excerpt from Hobson indicates, the "interest" requirement in Rule 24 must be measured by a practical rather than by a technical, legalistic yardstick based on property rights. The Court stated (p. 23):

"Rule 24 was amended as of July 1966 to overcome objections that conceptual difficulties with the principles of res judicata and property rights had made the rule unduly restrictive. See Notes of Advisory Committee on Rules, Rule 24(a), 28 U.S.C.A. (1967 Pocket Part); Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 153-154, 87 S.Ct. 932, 17 L.Ed.2d 814 (1967) (Mr. Justice Stewart, dissenting); Cohn, The New Federal Rules of Procedure, 54 Geo. L. J. 1198, 1229-1232 (1966). But how far the revisions go toward expanding the scope of Rule 24(a) is unclear.

"The Notes to the new rule indicate that the petitioner's interest should be clearly related (directly or indirectly) to the subject matter of the action, and suggest that that interest be a substantial one. The Revisers say: 'If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene * * *.'"
(Emphasis in original)

It cannot be effectively argued that Fuqua's interest

will not be substantially affected should this Court not allow it to intervene in this case. Should that occur, Fuqua would be unable to move to modify Trustee Order No. 3 so that it may be permitted to purchase the Trust Property.

In Nuesse v. Camp, 385 F.2d 694 (C.A.D.C. 1967), the Court rejected the notion that Rule 24(a)(2) requires a specific "legal" or "equitable" interest in property or a transaction. The Court stated (p. 700):

"We think a more instructive approach is to let our construction be guided by the policies behind the 'interest' requirement. We know from the recent amendments to the civil rules that in the intervention area the 'interest' test is primarily a practical guide disposing of law suits by involving as many apparently concerned persons as is compatible with efficiency and due process."

Further, the Court recognized that where, as here, intervention is sought in an atypical situation the provisions of Rule 24 "require other than literal application." *Id.* at 700.

In Smuck v. Hobson, 408 F.2d 175 (C.A.D.C. 1969), Chief Judge Bazelon warned against Rule 24 cases being decided by a "myopic fixation" on the conclusory phrase "interest". Indeed, he observed that the "interest" requirement of the Rule "may be a less useful point of departure than the second and third requirements, that the applicant may be impeded in protecting his interest by the action and that his interest is not adequately represented by others." *Id.* at 179. In holding that the right to intervene arises whenever there is a sufficient stake in the outcome, the Court stated (pp. 178-180):

"This does not imply that the need for an 'interest' in the controversy should or can be read out of the rule. But the requirement should be viewed as a prerequisite rather than relied upon as a determinative criterion for intervention. If barriers are needed to limit extension of the right to intervene, the criteria of practical harm to the applicant and the adequacy of representation by others are better suited to the task. If those requirements are met, the nature of his 'interest' may play a role in determining the sort of intervention which should be allowed - whether, for example, he should be permitted to contest all issues, and whether he should enjoy all the prerogatives of a party litigant."

More recently, in United States v. Reserve Mining Company, 56 F.R.D. 408 (D.C.D. Minn. 1972), in which the government brought an abatement action against the defendant, an alleged polluter, the Court used a very practical approach to grant the appellants intervention where they had a substantial pecuniary interest in the subject matters before the Court. The Court stated (p. 412):

"The answers filed by the applicants indicate that they have various economic interests which are inextricably intertwined with the fate of Reserve Mining Company. To illustrate, according to the answers filed by the applicants, there are approximately 11,000 people in northeastern Minnesota who are employed either directly by Reserve Mining Company or indirectly by various area businesses and industries supporting Reserve Mining Company. Many of these people live in the villages of Silver Bay, Babbitt, Beaver Bay, and the town of Beaver Bay, and thus in St. Louis and Lake Counties. The individuals employed by Reserve Mining Company and supporting businesses and the families of those individuals are dependent upon these businesses for their livelihood. The local agencies of government are dependent upon both the individuals and

Reserve Mining Company and supporting businesses for tax revenues necessary to maintain the efficient operation of local government. The other businesses are also dependent for their continued operation, in part, upon the continued operation of Reserve Mining Company. The disposition of this litigation could, therefore, have a substantial impact on local agencies of government in the area, individuals in the area, and industry and business in the area."

In sum, then, where the party seeking intervention has a substantial practical interest in the property or transaction that is at issue in the action, the "interest" requirement is met. It is not necessary that the party's interest be of a "legal" or "equitable" nature.

The District Court denied Fuqua's application to intervene herein as of right in large part because it found that Fuqua failed to demonstrate the requisite "interest" for purposes of Rule 24(a)2 (266a-268a). The District Court, however, committed reversible error relying on authorities which do not control the instant case.

The Court below relied primarily on Old Colony Trust Co. v. Penrose Industries Corp., 387 F. 2d 939 (3rd Cir. 1968). In that case, the plaintiffs commenced an action for a declaratory judgment that their proposed sale, subject to Court approval, of pledged collateral security held by them was "commercially reasonable" within the meaning of § 9-507(2) of the Pennsylvania Commercial Code. The defendants were the pledgors of the property in question and various secured and unsecured creditors of the company whose indebtedness to the plaintiffs was secured by the col-

lateral involved.

The proposed intervenors tendered to the District Court a written offer to purchase part of the collateral involved, for an amount substantially above the price of a proposed sale that the plaintiffs asked the Court to declare as commercially reasonable. Subsequently, the motion to intervene was made. The Third Circuit affirmed the District Court's order denying the movants intervention as of right.

We respectfully submit that Old Colony was decided incorrectly and that the applicants should have been allowed to intervene. The decision ignores the Supreme Court's holding in the Cascade case and other later cases decided under the Rule (see discussion, supra) which stand for the proposition that the "interest" requirement is to be viewed in practical terms rather than in terms of strict property concepts.

Moreover, and most importantly, the District Court ignored the fact that although intervention was denied, the District Court in Pennsylvania granted the movants' standing as amicus curiae and the Third Circuit ordered that the plan of purchase by the proposed intervenors had to be given careful consideration. The Court stated (p. 941):

"As the District Court noted, appellants' offer is clearly relevant to its determination of the issue of the commercial reasonableness of the plaintiffs' agreement of sale with Field. Indeed, in connection with the pending decision in the District Court of such issue, the judge has indicated that the appellants' offer will be considered."

Finally, Old Colony is distinguishable. The decision there was bottomed on the fact that the plaintiffs were only obligated to make a commercially reasonable sale. Thus, even if the Court found the appellants' offer to be higher in value than the proposed sale, the Pennsylvania Commercial Code did not obligate the plaintiffs to sell the collateral to the appellants. Nor was there any outstanding Court order which the appellants wanted modified. Accordingly, there was no practical reason to have the appellants as formal parties to the action; consideration of their offer was sufficient relief.

In the instant case, however, the Trustee is under a fiduciary duty to the Court, ITT and Avis to make the most advantageous sale of the Trust Property. See Point II, infra. Accordingly, there is a benefit to all concerned to have Fuqua as a formal party to the action, for if the Trustee fails to take the necessary steps to modify Trustee Order No. 3, then Fuqua, as a formal party, could make such a motion. Since practical considerations herein make this case factually inapposite from Old Colony, the decision there does not control the case at bar.

Nor was the District Court correct in applying Donaldson v. United States, 400 U.S. 517 (1970), to the case at bar. In that case, the Supreme Court denied a taxpayer intervention in an Internal Revenue Service summons proceeding which sought from the taxpayer's former employer and the employer's accountant various records of the taxpayer. The Court's finding that the taxpayer did not have a "significantly protectable interest" cannot be

extrapolated to the instant case, for clearly a narrow reading of the intervention rule was thought necessary in Donaldson in order to protect the public interest in prompt and effective investigation and enforcement of the revenue laws. 400 U.S. at 531. Further, it is difficult to see how the language "significantly protectable interest" could be applied by Judge Blumenfeld to the instant case for, as stated in Wright & Miller, Federal Practice and Procedure § 1908, p. 502:

"The terms 'significantly protectable interest' has not been a term of art in the law and there is sufficient room for disagreement about what it means so that the gloss on the rule is not likely to provide any more guidance than does the bare term 'interest' used in Rule 24 itself."

Nor is Fuqua's interest in the instant lawsuit contingent within the meaning of the decision in In Re Penn Central Commercial Paper Litigation, 62 F.R.D. 341 (S.D.N.Y. 1974), aff'd, 515 F. 2d 505 (2d Cir. 1975). In that case, the proposed intervenor's interest was merely its concern in seeing one side prevail in the lawsuit because of the stare decisis or collateral estoppel effects of that decision on a related case in another court. The Court stated (p. 347):

"Determinations made by this court with respect to legal questions arising under the federal security laws will not be binding on the District Court in Washington. While it is true that a decision in one district may be of some persuasive value in another, a holding that this constitutes an interest sufficient to justify intervention would expand the scope of Rule 24(a)(2) to such an

extent that the interest requirement would essentially be read out of the rule. There is no basis in law or in policy for this court to take that step."

Accordingly, the proposed intervenor's interest was held to be too speculative.

In this case, however, Fuqua's interest is dramatically different. It has a direct, substantial pecuniary interest in certain property under the Court's control and accordingly, Penn Central does not control the instant application for intervention.

Moreover, Fuqua's "interest" is not contingent within the meaning of Kheel v. American Steamship Owners Mutual Protection and Indemnity Association, 45 F.R.D. 281 (S.D.N.Y. 1968). In that case, the proposed intervenors were negligence claimants who held provable claims against a bankrupt. They sought to intervene in a declaratory judgment action brought by the trustee in bankruptcy against the bankrupt's insurer for construction of an insurance policy. Since there was no evidence that the trustee's recovery would inure to the applicants' benefit, the Court denied intervention on the ground that their interest was contingent. Like the proposed intervenors in Penn Central, the applicants had only a general interest in having the trustee prevail because there would be a larger estate from which the applicants might recover, an interest glaringly dissimilar from Fuqua's in the case at bar.

The next case on which Judge Blumenfeld based his decision is Solien v. Miscellaneous Drivers & Helpers Union Local No.

610, 440 F. 2d 124 (8th Cir. 1971), cert. denied, 403 U.S. 905 (1972).

That decision, however, is not authority to deny Fuqua intervention for there, the Court denied the application to intervene because a statute specifically denied a private party the right to bring an injunction suit for an unfair labor practice. Since a private individual could not initially bring an injunction suit based on an unfair labor practice, it could not seek intervention in the same suit brought by the National Labor Relations Board. In this case, however, there is no statute denying Fuqua the right to seek the relief sought in its proposed intervenor's complaint, i.e., the modification of Trustee Order No. 3. Although the lower Court was of the opinion that Fuqua would be unsuccessful in obtaining such relief, it is hornbook law that the question of whether ultimate relief will finally be granted is irrelevant to the application for intervention. As was stated by the Court in Atlantis Development Corporation v. United States, 379 F. 2d 818, 827 (5th Cir. 1967):

"As to the others, it is, of course, conceivable that there will be some instances in which the total lack of merit is so evident from the face of the moving papers that denial of the right of intervention rests upon a complete lack of a substantial claim. But it hardly comports with good administration, if not due process, to determine the merits of a claim asserted in a pleading seeking an adjudication through an adversary hearing by denying access to the court at all."

Finally, the decision below was thought to be supported by United States v. International Telephone & Tel. Corp., 349 F.

Supp. 22 (D. Conn. 1972). In that case (which was an early stage of the instant litigation), Ralph Nader and Ruben B. Robertson, III moved to intervene to move the Court to set aside the judgment on the ground that it had not been fashioned in a way that was tailored to eliminate the anti-competitive aspects which the original complaint alleged to be illegal.

The Court held that the applicants could not intervene because they did not have a personal stake in the outcome of the controversy. The Court stated (p. 27):

"[T]o entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action, he must show that he has sustained or is immediately in danger of sustaining a direct injury as a result of that action."

Since the movants were representing the public interest in a representative capacity, the Court was hesitant to find the requisite personal stake in the outcome of the controversy. Fuqua's application for intervention herein is not made in any representative capacity; rather, it is made to protect a legitimate, direct and substantial pecuniary interest of Fuqua. Thus, the lower Court misapplied the law in finding U.S. v. ITT applicable here.

Protection of Interest and Representation

Rule 24(a)(2) next requires a determination that the applicant is so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest.

It is generally agreed that in determining whether the disposition of the action will impede or impair the applicant's ability to protect his interest, the question must be viewed in a practical sense. The central purpose of Rule 24(a)(2) is to allow intervention by those who might be practically disadvantaged by the disposition of the action. Atlantis Development Corp. v. United States, supra.

Absent intervention, Fuqua cannot move to modify Trustee Order No. 3 and the Trustee would continue his position that he is unable to accept Fuqua's offer. Further, even should Trustee Order No. 3 be modified at some future date, unless Fuqua is allowed to intervene at this point and enjoin the presently scheduled secondary offering of Avis stock, Fuqua will be put at a practical disadvantage in asserting its legitimate interest in the Trust Property.

The last test involved in Rule 24(a)(2) concerns the question of whether the applicant's interest is adequately represented by existing parties. According to the literal terms of the Rule, it is clear that intervention is to be allowed unless the Court is persuaded that the representation of the applicant is in fact adequate. Thus, the burden of persuasion on this issue is on the party resisting the motion to intervene. Doubts are resolved in favor of the proposed intervenor and intervention is allowed whenever there is significant possibility that representation of existing parties may prove inadequate. Nuesse v. Camp, supra.

Where, as here, the interest of Fuqua is not represented at all, it cannot be properly said that Fuqua is adequately represented.*

B. The District Court Abused Its Discretion in Denying Fuqua Permissive Intervention

Rule 24(b)(2) provides, in pertinent part, as follows:

"Upon timely application anyone may be permitted to intervene in an action ... (2) when an applicant's claim or defense and the main action have a question of law or fact in common."

Judge Blumenfeld's entire decision with respect to Fuqua's application for permissive intervention is contained in the following excerpt from the decision.

"Now, permissive intervention depends upon whether there are common questions of law or fact to be litigated and the prejudice to the actual litigants. Well, no one is yet litigating any matter respecting of the Trustee's breach of fiduciary duty. There is some allegation in Miller, Count Two, but the rule to show cause does not embrace what is alleged in Count Two." (268a)

It is respectfully submitted that while the District Court correctly articulated the appropriate statutory test for permissive intervention, it failed to follow the appropriate

* At oral argument before this Court, counsel for Avis suggested that if ITT favored the Fuqua offer, it would come forward to support it. To argue that ITT opposes the Fuqua offer requires one to accept the proposition that ITT desires to take a minimum \$2.54 per share (approximately \$5,000,000 aggregate) loss on the proposed secondary offering alone (163a) by having the shares sold publicly rather than to Fuqua. This is apart from any losses arising from the difference between net receipts to ITT from the additional public offerings required to complete divestiture and the Fuqua offer.

standard or approach in exercising its discretion.

First, although permissive intervention may be denied in order to avoid the likelihood of undue delay, here the District Court's denial of intervention was not put on that ground. Indeed, the Lower Court made no finding whatsoever that Fuqua's intervention would result in any prejudicial delay to any party and, the factual situation does not support it.

In point of fact, allowing Fuqua to intervene and to have the Court consider Fuqua's proposal to purchase the Trust Property will speed up the final disposition of this action. For, should the Fuqua offer not be considered, the divestiture of ITT's holding of Avis shares will take place over a period of several years through a series of public offerings.

The Rule requires the Court to consider whether intervention will unduly delay the adjudication. Since Judge Blumenfeld did not weigh this consideration, he abused his discretion. See Textile Workers v. Allendale Co., 226 F. 2d 765 (C.A.D.C. 1955).

Second, the District Court failed to apply the well established rule that permissive intervention is often warranted even where the proposed intervenor can show no common claim or defense in the technical sense. As one court stated the rule, "the failure to come within the precise balance of Rule 24's provisions does not necessarily bar intervention if there is a sound reason to allow it". Textile Workers v. Allendale Co., supra. And, a real economic stake in the outcome of litigation

has been held to be just such a sound reason to allow permissive intervention. Champ v. Atkins, 128 F. 2d 681 (C.A.D.C. 1942).

As stated in 3B Moore, Federal Practice ¶ 24.10[2] at p. 24-354:

"[I]n some of the decisions allowing permissive intervention, the existence of any nominate 'claim' or 'defense' is difficult to find. For example, in Champ v. Atkins, X obtained a judgment against a taxicab association as a result of an accident involving a cab owned by a member of the association. The judgment was not paid, and proceedings were commenced to suspend the licenses of all of the members of the association. Some of the members brought a declaratory judgment action against the local officials to prevent suspension of their licenses. X was permitted to intervene. On appeal this was sustained, on the ground that suspension of the licenses was likely to induce the judgment debtors to pay X's judgment, and that X's 'economic interest in that inducement' justified intervention."

More recently, in Brooks v. Flagg Brothers, Inc., 63 F.R.D. 409 (S.D.N.Y. 1974), the principle that sufficient economic interest in the subject matter of the action is the functional equivalent of a common question was reaffirmed. The Court stated (p. 415):

"The test of permissive intervention is broader however. First, the rule reads in the disjunctive -- question of law or fact -- so that intervention may be permitted where the question of law, though not of fact, is common. Second, the word 'claim or defense' have not been read in a technical sense, but permissive intervention has been upheld even where in Professor Moore's phrase 'the existence of any nominate 'claim' or 'defense' is difficult to find.' Moore, Federal Practice, ¶24.10[2], 24-354.

"A ground for intervention is 'economic interest.' [citing numerous cases]."

Thus, the District Court erred in concentrating on there being a common question of law or fact in the strict sense.

In any event, it is clear too that there is a common question of "law or fact" at issue in this case. The common question involves the manner in which the Trust Property shall be disposed of by the Trustee in a manner most beneficial to all parties in the main action.

POINT II

THIS COURT IS WARRANTED IN EXERCISING PLENARY JURISDICTION IN THIS CASE AND TRUSTEE ORDER NO. 3 SHOULD BE AMENDED.

The necessity for amendment of Trustee Order No. 3 is recognized by many of the individuals submitting affidavits in opposition to the Fuqua application. Typically these individuals state the desirability of considering all offers for the Trust Property and further state that but for the alleged "delay" in the Fuqua offer,* consideration would have been given it. These individuals ignore the position of the Trustee that since the date of Trustee Order No. 3 (January 14, 1976), he is precluded from even considering proposals to purchase the Trust Property as a block.

Thus, Colin Marshall ("Marshall", President of Avis) states: "Had Fuqua made its proposal at any time during the past year and a half, the shareholders of Avis, the Trustee and the Court would have had ample time to consider it." (63a). John Scanlon (a director of Avis) states: "No member of the Board has the slightest desire to oppose such a transaction at a fair and reasonable price." (39a). Scanlon further states that the Proposals were introduced because "it seemed desirable to the Board to provide time to the Board and to the stockholders to appraise any offer which might be made prior to the time when

* As discussed above, Fuqua's "delay" results solely from the unanticipated, sudden action by Avis and the Trustee in proposing the extraordinary lock in Proposals adopted at the Annual Meeting.

the depressing influences on the stock price for Avis had been dissipated [sic] and also time to give full consideration to all available offers." (40a). Finally, Messrs. Troubh and Roehl (financial advisors to the Trustee) stated in a report to the Trustee dated December 15, 1976:

"We recognize that you may, from time to time, receive offers for all or part of your Avis holdings. Some of these offers may include similar offers to the public shareholders. While we shall continue to examine each such offer on its merits, we believe that, absent extraordinary circumstances, you should maintain your present course of action."

(316a). In contrast the Trustee in his affidavit states that pursuant to Trustee Order No. 3, he is "not entertaining private offers" (Smith aff. par. 44). The Trustee has taken a similar position in a letter to counsel for Fuqua (102a).

Fuqua agrees with the above quoted individuals as to the desirability of consideration of all proposals to purchase the Trust Property. Absent amendment of Trustee Order No. 3 such consideration will not occur. Trustee Order No. 3 should therefore be amended.

A. Applicable Duties Of a Trustee

(1) The Changed Circumstances Doctrine

The Trustee in the instant case has taken a "head in the sand" position--as long as Trustee Order No. 3 is outstanding, he will not consider any offers to purchase the Trust Property. However, the Trustee has fundamentally misconstrued his duties under the applicable principles of trust law. Not

only may he not rely on Trustee Order No. 3 in changed circumstances, but he himself is under a duty to seek modification of it. As Professor Scott states:

"We have been considering the question of the extent of the duty of the trustee to comply with the terms of the trust. He may be under a duty not to comply. In other words, not only may he have a privilege to deviate from the terms of the trust but he may owe a duty to the beneficiaries to deviate. Where there has been such a change of circumstances that it appears to the trustee that compliance with the terms of the trust would defeat or substantially impair the accomplishment of the purposes of the trust, the trustee cannot properly do nothing to prevent the threatened loss on the ground that he has no power to prevent it. It is his duty to apply to the court for the power necessary to prevent the loss. The fact that he strictly complies with the terms of the trust is not a justification for his conduct if he acts as a prudent man would not act under the circumstances. Thus where the trustee has no power of sale, or even where a sale is expressly forbidden by the terms of the trust, but a sale is necessary because of change of circumstances in order to prevent the loss of the property, it is the duty of the trustee to apply to the court for permission to sell the property, and if he fails to do so he may be liable for the resulting loss."

II A. Scott, The Law of Trusts, § 167.2, p. 1288 (1967) (footnote omitted, emphasis supplied). As demonstrated below, the circumstances leading to Trustee Order No. 3 have unquestionably changed. While the Trustee has not sought modification of the order as is his duty, this Court should not close its eyes to these changed circumstances.

(2) Self-dealing by a Trustee In the Sale of Trust Property

A Trustee does not only violate his fiduciary duty by purchasing trust property himself. He may also violate such duty if a sale by him is such as to benefit his own interests.

III A. Scott, The Law of Trusts, § 170.10, pp. 1322-1324 (1967).

In the instant case, sale of the Trust Property to the public rather than to Fuqua will not benefit Avis, the Avis stockholders or the trust beneficiary ITT but will benefit the Trustee. Following commencement of the instant application and the Prather action, the compensation received by the Trustee and his law firm was disclosed in a Supplement to the Proxy Statement (pp. 19-21, supra). Should the Trust Property be sold to Fuqua, the trusteeship would immediately terminate. In contrast, even after the proposed secondary offering, the Trustee will retain 22% of the common stock of Avis and the trusteeship will continue until at some unspecified future date, divestiture is complete. In the circumstances, this Court should bring its independent judgment to bear on the question of whether Trustee Order No. 3 should be amended.

B. The Changed Circumstances Herein

(1) Circumstances Leading to Trustee Order No. 3

The circumstances leading to Trustee Order No. 3 have been described above (pp. 2-5). In summary, according to the Trustee, the offers received by him for purchase of the Trust Property as a block were characterized by some or all of the following negative characteristics: (1) sale price at a discount

from book value; (2) sale price at a discount from market value; (3) force out of minority shareholders at a discount; (4) long delay in termination of the Trust; (5) dilution of Avis common stock; and (6) unfair advantage to the initiating group.

Typically, in his Second Report the Trustee stated that at that time (March 3, 1975), "a public sale of the Trust Property ... would be difficult if not impossible, except on so drastic a give away basis as to ruin the market for Avis stock with consequent serious loss to the public shareholders of Avis, and damage to the financial standing of Avis" (324a). As recently as December 15, 1976 the Trustee's financial advisors (Messrs. Roehl and Troubh) recommended against a single sale of the Trust Property to a third party. Yet, the basis of this recommendation was clearly the Trustee's advisors' belief that such a sale could only be accomplished at a discount from market price.* However, as noted above, Messrs. Roehl and Troubh went on to recommend that the Trustee consider all offers to purchase the Trust Property (316a)--a recommendation the Trustee has not followed in summarily rejecting the Fuqua offer.

Further, Trustee Order No. 3 states that the Trustee has advised the court that he had not received a "firm offer" for the purchase of the Trust Property and was not "engaged in any negotiations with any party which would lead to such an offer" (92a).

* Thus they stated "A single sale of the entire Trustee holding at this time could only be done at an unacceptable discount from current market" (314a).

None of the above assumptions apply to the Fuqua offer. The offer is "firm". The offering price of \$15.50 in cash is \$1.624 per share (\$6,079,450 in aggregate over the entire Trust Property) above the market value of Avis' common stock at the close of business on May 16, 1977 and \$1.24 per share (\$4,641,945 in aggregate) above its book value per share as of December 31, 1976 (22a). It is \$6.90 more than the per share price paid for the sale of 1,250,000 shares on May 27, 1976 (Id.). It is \$2.54 per share more than a generous estimate of what the Trustee will receive in his proposed secondary offering (approximately \$5,000,000 in aggregate over the 2,000,000 shares to be sold) (163a).

Minority shareholders will not be forced out at a discount but will receive value which will at a minimum reflect the premium paid to the Trustee. Under the Trustee's proposal for public distribution, neither ITT nor the public will receive such a premium.

There would be no delay in termination of the Trust under the Fuqua proposal. Rather, in contrast to the Trustee's plan for public distribution, the trust with its attendant expenses would terminate immediately.

There would be no dilution of Avis common stock under the Fuqua proposal. Neither would Fuqua nor its stockholders reap an unfair advantage vis a vis the Avis stockholders, since Avis stockholders would participate in the proposed merged company by receiving stock reflecting the premium paid to the Trustee for the Trust Property.

(2) Effects of Trustee Order No. 3
on Avis And Its Stockholders

In the District Court, Avis and the Trustee did not seriously attempt to contend that the Fuqua proposal was subject to the same infirmities as the proposals that led to Trustee Order No. 3. Rather a series of unsupported and conclusory affidavits was filed which purported to demonstrate that the Trustee's plan was beneficial to Avis and its stockholders while the Fuqua plan would be to their detriment. The allegations were made against the background of the Trustee's position that in any event he will not even consider the Fuqua offer while Trustee Order No. 3 is outstanding.

Partially in response to these unsupported allegations, a report prepared by the firm of Bear, Stearns & Co. (the "Bear Stearns report") was filed with the District Court (151a-167a). The Bear Stearns report deals with the financial effects of the proposals contained in the Proxy Statement and the effects of Fuqua's offer to purchase the Trust Property and its proposal regarding the future of Avis on the public shareholders of Avis, ITT, and Avis itself. The Court's attention is respectfully directed to the Bear Stearns report which demonstrates that Avis' and the Trustee's assertions in opposition to Fuqua's application are without basis in fact or economics.

The Bear Stearns report concluded that the existence of Trustee Order No. 3 has had a depressing effect on the market price of Avis shares:

"Prior to the announcement in January 1976 that the Trustee had obtained court approval to distribute the Avis shares beneficially owned by ITT through a series of public offerings, many sophisticated investors and analysts considered the sale of control of Avis to a major corporation to be a possible course of action for the Trustee. A comparison of the price/earnings ratio of Avis with that of the Standard & Poor's Industrial Index ("S&P") from 1975 to date shows that the Avis price/earnings ratio as a percentage of the S&P price/earnings ratio fell sharply after January 1976, and Avis' relative price/earnings ratio has consistently remained below its 1975 level ever since. (See Exhibit A). In our judgment, the 1975 Avis market prices reflected a premium attributable to the potentiality of a take-over of Avis."

(158a). A director of Avis in an affidavit acknowledged that "the substantial overhang of unsold stock in the Trustee's hands" has had a depressing effect on the market price of Avis stock (39a). The Fuqua offer would of course remove this overhang. The Bear Stearns report further concluded that the "extraordinary" lock-in proposals adopted at the Annual Meeting would further act to depress the market price of Avis shares (154a-155a).

Marshall in his affidavit purported to demonstrate the benefits of the trusteeship to Avis and its stockholders, including a statement that after appointment of the Trustee, Avis' profits "soared" (57a). As the Bear Stearns report points out, Marshall's assertions in this regard are not borne out by Avis' profits relative to those of its competitors:

"The sales, net income, and net income as a percentage of sales of Avis, Hertz and

National Car Rental for the period 1972-76 are presented in Exhibit B. The table shows that, although Avis' sales gain of 48% during the four-year period from 1972 to 1976 was better than the sales gain recorded by its two largest competitors, its earnings increase of 103% was less than that obtained by either of the other firms. In 1972, Avis' net profit margin of 2.8% was equal to National's and somewhat better than that of Hertz; although Avis' net margin improved to 3.8% in 1976, Hertz and National had margins of 5.3% and 4.8%, respectively."

(161a-162a). Marshall further alleged that Avis' "independence gives it a distinct competitive advantage over the other rent a car companies" (57a). However, the above quoted statistics indicate that both Hertz and National, owned by RCA Corporation and Household Finance Corporation, respectively (157a) have outperformed Avis.

Thus, not only have the circumstances which led to Trustee Order No. 3 changed but its continued unamended existence will bring no benefit to Avis or its stockholders.

(3) Effects of the Fuqua Offer

The affidavits in opposition to Fuqua's motion presented a parade of horrors, consisting of the allegedly adverse effects on Avis and its stockholders that would result from the Fuqua offer. The Bear Stearns report demonstrates that these allegations are unfounded.

The Trustee's financial advisor, Troubh, stated that Fuqua securities are speculative and "as a professional investment advisor" he would not recommend their acceptance in exchange for Avis shares (111a). Troubh's opinion regarding the quality of

Fuqua securities is not shared by an extensive group of prominent investment banking firms who recently participated in an underwriting of Fuqua securities (161a).

A director of Avis, Shapiro, expressed a similar fear that Avis stockholders will be coerced into accepting a security less attractive to them than their Avis shares. Such a fear is unfounded. Avis stockholders will have the opportunity to exchange their Avis shares for shares in a corporation resulting from a merger between Avis and Fuqua. The Bear Stearns report stated that the securities of the merged company would be attractive to investors (161a). Troubh further expressed a fear that the merged company will be stigmatized as a conglomerate (112a). A merged company would essentially be a transportation company and would not fall into the conglomerate category (161a).

Troubh further indicated that Avis stockholders would be adversely affected by a drop in the market price of Avis stock below the price offered to the Trustee (111a) and that the Avis stockholders will be left "in a quandry for an indefinite time, subject to the fluctuations of the market" (111a). However, the fact that Fuqua will make an offer to the Avis stockholders within thirty days of the proposed purchase from the Trustee obviates this criticism. Further, as repeatedly noted above, the Avis stockholders are in no way at the mercy of the market--they will receive value at least equivalent to that given to the Trustee.

Perhaps the most incomprehensible of Troubh's arguments

is his statement that Fuqua's proposal fails to give recognition to value inherent in a control block of stock (Trough aff. par. 19(b)). Yet, it is Trough who has stated in his reports to the Trustee (p. 48, n. (*)) that sale of the Trust Property would command not a premium but a discount. In any event, Fuqua's proposal does include a premium over market and book value. Further, under Fuqua's proposal, this premium will not inure solely to the benefit of ITT but will be shared with the public since Fuqua will offer the public value at least equivalent to that offered ITT.

Moreover, the Fuqua offer will have no adverse effects on Avis itself. Marshall raises fears of loss of business by Avis from unspecified competitors of Fuqua (62a) and the effect on Avis if it were to fall into the hands of owners who knew nothing about the rental business (62a). However, as noted above both Hertz and National, owned by RCA Corporation and Household Finance Corporation respectively (157a), have outperformed Avis.

Marshall further expresses fears regarding the effect of Fuqua's offer on Avis' management (62a-63a). Fuqua has expressed no intention to change Avis' management. Further, the Bear Stearns report states that Fuqua's management would be superior to an Avis management locked in pursuant to the Proposals to be submitted to the stockholders at the Annual Meeting (165a).

Trough states that affiliation with Fuqua would hinder Avis in its credit relationship (111a). The Bear Stearns report reaches the opposite conclusion, stating that, "The combined

company would be a well-capitalized, vigorous business entity with substantial access to capital and a broad public market for its common stock." (161a). Marshall's contention that Avis loans would be called should Fuqua purchase the Trust Property (57a-59a) was simply unsupported speculation.

Marshall further raised the possibility that Avis' stock, upon acceptance of the Fuqua offer, would be delisted from the New York Stock Exchange ("NYSE"). This statement appears to be purely Marshall's opinion, unsupported by any statements from the NYSE and the Bear Stearns report reached the opposite conclusion (159a-160a).

Marshall raised the possibility of litigation directed against Avis should the Trust Property be sold to Fuqua (60a). This litigation would allegedly be based on representations made in ITT's public offerings. However, as discussed above (p. 3), the prospectuses in the ITT offerings clearly indicated that the stock now comprising the Trust Property might be sold in a private sale.

Shapiro, purported to demonstrate that the Trustee could obtain a greater amount for the Trust Property through his policy of public offerings than through acceptance of the Fuqua offer (46a-47a). Shapiro's analysis seems to depend on a scenario which he himself describes as "not difficult to imagine" (47a). In any event, the Bear Stearns report demonstrated that Shapiro's analysis was incorrect (163a-164a).

Shapiro further objected to the Avis offer on the

ground that it will encourage other similar offers (48a). Yet, such offers could only be to the advantage of Avis and its stockholders. In oral argument before this Court, counsel for Avis raised objection to the "delay" entailed in amendment of Trustee Order No. 3 and any ensuing auction of the Trust Property. Typically, Avis and the Trustee state that they oppose the delay required to consider offers to purchase the Trust Property and to amend Trustee Order No. 3. They have argued that the lock-in proposals and the secondary offering must proceed immediately. Yet, they propose to continue the trusteeship into the indefinite future thereby causing the ultimate delay with which this Court should concern itself.

Whether amendment of Trustee Order No. 3 and consideration of resulting offers to purchase will delay the planned secondary offering, after which the Trustee will still retain 22% of Avis' common stock, is irrelevant. Clearly amendment and sale could be accomplished long before complete divestiture through public offerings. It is this consideration which is relevant and, along with the benefits of amendment to all concerned parties in the instant action, should lead this Court to direct that Trustee Order No. 3 be amended.

C. This Court May Direct That Trustee Order No. 3 Be Amended

It is well established that the jurisdiction of this Court on the instant appeal is plenary. Twenty-eight U.S.C. § 2106 provides:

"The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

Professor Moore states regarding this section:

". . . Once a timely appeal is taken from an order made appealable by statute, the power of a court of appeals should be plenary to the extent that it chooses to exercise it. A court should not close its eyes to what is plainly there. To read 28 USC § 2106 in a technical way is to defeat its purpose. The spirit of the decision of the Second Circuit in *Hurwitz v. Directors Guild of America, Inc.*, deserves wide diffusion. In *Hurwitz*, an appeal was taken from an order denying a preliminary injunction. persuaded by its study of the record that the plaintiffs were entitled to judgment on the admitted facts as a matter of law, the court of appeals reversed with instructions to grant a permanent injunction. To be sure, the circumstances were unusual, but the decision stands for the larger, very salutary proposition that once a case is lawfully before a court of appeals, it does not lack power to do what plainly ought to be done."

9 Moore's Federal Practice ¶110.25 [1], p. 273 (footnote omitted). Thus in the instant case on an appeal, this Court "does not lack power to do what plainly ought to be done"--to permit Fuqua to intervene herein and to direct that Trustee Order No. 3 be amended to permit the sale of the Trust Property to Fuqua.

In the above quotation, Professor Moore cited the decision of this Court in *Hurwitz v. Directors Guild of America, Inc.*, 364 F.2d 67 (2d Cir. 1966) cert. denied 385 U.S. 971 (1966), in

which this Court in an appeal from an order denying a preliminary injunction granted judgment for plaintiff in the form of a permanent injunction. In Hurwitz, a portion of plaintiffs' motion for a preliminary injunction was moot at the time of appeal in that it sought to interfere with union elections already held (364 F.2d at 69). However, plaintiffs also sought a mandatory preliminary injunction compelling the union to admit them to membership pendente lite. This Court found that plaintiffs were entitled to the relief sought pendente lite on the merits and permanently. In the interest of "economy in litigation" the Court directed that judgment on the merits be entered for plaintiff.

Similarly in the instant case, Fuqua's motion to intervene is not moot. The ultimate issue it raises - whether Trustee Order No. 3 should be amended - is not moot. This Court may therefore direct that Fuqua's motion to intervene be granted and that Trustee Order No. 3 be amended. Alternatively, as set forth below, it may direct that Fuqua's motion to intervene be granted and that the proposed secondary offering be stayed pending a hearing as to whether Trustee Order No. 3 should be amended. See Point III infra.

In Mercury Motor Express, Inc. v. Brinke, 475 F.2d 1086 (5th Cir. 1973), the Fifth Circuit held that upon appeal from an order denying a preliminary injunction, it possessed plenary power in the action and could thus review an otherwise

unreviewable stay order.* Accord Mast, Foos & Co. v. Stover Manufacturing Co., 177 U.S. 485, 494-495 (1900); Noel v. Chapman, 508 F.2d, 1023, 1024-1025 (2d Cir. 1975); Aerojet-General Corp. v. American Arbitration Association, 478 F.2d 248, 252 (9th Cir. 1973) ("This is an equity case, and it is well established that in such a case . . . an interlocutory appeal brings the entire case before the court."). See Brosch v. Drexel Firestone, Inc., 519 F.2d 974, 994-995 (2d Cir. 1975), cert. denied 423 U.S. 1018 (1975); Capital Temporaries Inc. v. Olsten Corp., 506 F.2d 658, 660 (2d Cir. 1974).

* Similarly in the Miller action, this Court may on the instant appeal review the action of Judge Blumenfeld in refusing to hear Miller's application to intervene herein and to enjoin the proposed secondary offering.

POINT III

THE TRUSTEE SHOULD BE ENJOINED FROM PROCEEDING WITH THE PRO- POSED SECONDARY OFFERING

This Court should direct that the Trustee be enjoined from proceeding with the proposed secondary offering which would reduce the percentage of Avis common stock held by him from 47% to 22%. In the event this Court directs that Trustee Order No. 3 be amended such injunction would be necessary to prevent frustration of the purpose of amendment of the order. Alternatively this Court may direct that Fuqua's motion to intervene be granted, direct the District Court to hold a hearing as to whether Trustee Order No. 3 should be amended, and direct that the proposed secondary offering be enjoined pending the result of the hearing.

A. The District Court Erred in Denying Fuqua Preliminary Injunctive Relief

With regard to the standard of review to be applied to the denial of Fuqua's motion for a preliminary injunction, the opinion of District of Columbia Circuit in National Resources Defense Counsel, Inc. v. Morton, 458 F.2d 827 (D. C. Cir. 1972), should be noted. The Court in that case considered a motion for summary reversal of the grant of a preliminary injunction by the District Court. With regard to the standard of review the Court stated:

"However, a greater amplitude of judicial review is called for when the appeal presents a substantial issue that the action of the trial judge was based on a

premise as to the pertinent rule of law that was erroneous. Not only the avowed forecast as to probability of success on the merits, but also the analysis of injury to either or both parties, the public interest, and the balancing of interests may well come to depend on an assumption of underlying legal premise. When this can be identified, the appellate court furthers the interest of justice by providing a ruling on the merits to the extent that the matter is ripe, though technically the case is only at the stage of application for preliminary injunction. And a reversal based on a disagreement with the underlying legal premise of the trial court is not based on, or to be construed as, a determination of arbitrary abuse of judicial discretion."

458 F.2d at 832 (footnote omitted). Accord Northeast Construction Co. v. Romney, 485 F.2d 752, 756 (D.C. Cir. 1973).

Further this Court's scope of review is greater where, as here, the District Court denied Fuqua's motion without hearing oral evidence. The District Court's decision was based solely on the affidavits which are in the record before this Court and oral argument by counsel. This Court is therefore in the same position as was the District Court. National Grain Yeast Corp. v. City of Crystal Lake, 147 F.2d 711, 713 (7th Cir. 1945).

Applying these principles, it is submitted that the denial of Fuqua's motion for a preliminary injunction by the District Court was an error which this Court may correct. The test for an injunction in this Circuit is that of Sonesta International Hotels v. Wellington Associates, 483 F.2d 247, 250 (2d Cir. 1973).

"* * * only upon a clear showing of either

(1) probable success on the merits and possible irreparable injury, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting preliminary relief."

(Emphasis in original). The District Court found that Fuqua had demonstrated neither probable success on the merits nor possible irreparable injury (269a-272a).

Initially, it should be noted that Judge Blumenfeld's rulings with respect to irreparable injury and success on the merits were affected by his threshold finding that Fuqua could not intervene herein. For the reasons discussed in Point I, supra, it is submitted that this ruling was erroneous. If Fuqua is permitted to intervene, the probable success on the merits - possible irreparable injury analysis changes significantly.

Further, the District Court stated that its finding as to probable success on the merits was influenced by the fact that, based solely on Avis' and the Trustee's affidavits, it had concluded that Trustee Order No. 3 should not be amended. The Court stated:

"And even if Fuqua were to be granted the right to intervene permissibly or as of right, its chances of success on the merits, that is, to amend Trustee Order Number 3, are extremely remote.

"They lack legal standing in this case. As I say, it's not very likely that this Court would force the Trustee to accept the offer of Fuqua, for the reasons which are stated in the affidavits submitted by the defendant."

(271a-272a). For the reasons discussed in Point II, supra, it is respectfully submitted that Trustee Order No. 3 should be amended. At the very least, a decision not to amend it should not be made solely on the basis of the affidavits filed by the Trustee and Avis.

B. Irreparable Injury to Fuqua And Other Litigants

Further, it is respectfully submitted that the District Court's analysis of possible irreparable injury to Fuqua was flawed. Judge Blumenfeld's ruling as to the possibility of irreparable injury is summarized in his statement that "... Fuqua will not suffer irreparable injury. As I said earlier, you can still try to take over Avis - you just have to try harder" (Tr. 104). Similarly, Judge Blumenfeld cited cases (Clairdale Enterprises, Inc. v. C. I. Realty Investors, 423 F. Supp. 261 (S.D.N.Y. 1976); McConnell v. Lucht, 320 F. Supp. 1162 (S.D.N.Y. 1970)) in which preliminary injunctions to enjoin annual meetings were denied in part because after a trial on the merits if plaintiff prevailed, the results of the meeting could be set aside and a new vote held.

Such an analysis ignores the fact that if the lock-in Proposals are adopted by Avis (as they now have been) and the Trustee is permitted to proceed with the proposed secondary offering, no matter how hard Fuqua tries, it will not be able to obtain the management control of Avis it would obtain were it permitted to purchase the Trust Property.

The Trustee, as discussed above, has taken the position that unless and until Trustee Order No. 3 is amended, he will not consider the Fuqua offer and will proceed with the secondary offering. Whether Fuqua could, after the Trust Property is partially dispersed, obtain 47% of the common stock of Avis is itself uncertain.

Further even if Fuqua were able to obtain 47% of the common stock of Avis, it would be unable as a practical matter to obtain management control of Avis in view of the lock-in Proposals adopted at the Annual Meeting.* Realistically, even if Fuqua were to obtain a control position in Avis stock at a later date, the outside directors would not resign or agree to a merger between Fuqua and Avis. The tendency of incumbent management, no matter how disinterested they purport to be, is to assume they can provide management superior to any outside group.

Without the acquiescence of the board of directors, the only alternative method of obtaining management control of Avis after the Proposals submitted at the Annual Meeting have been adopted is to obtain an 80% vote of all outstanding shares. Again as a practical matter, such a vote would be virtually impossible to obtain. Even with the Trustee voting 47% of the Avis common stock in favor of the Proposals at the Annual Meeting, the highest percentage affirmative vote obtained was 72% of the shares eligible to vote.

* As discussed above (pp. 5-7), Proposals (2) and (3) prevent a purchaser of 47% of Avis' common stock from obtaining a majority of the board of directors for two years and prevent mergers or similar transactions without an 80% stockholder vote unless two-thirds of the directors approve.

Similarly, cases which state that results of annual meetings can be undone after a trial on the merits are inapposite in the instant situation. Whether the results of the Avis Annual Meeting are undone depends on the outcome of stockholder suits to which Fuqua is not a party. Even were the results of the meeting ultimately undone, for the reasons discussed above, as a practical matter if the Trust Property has by that time been divested through public offerings, Fuqua would be unable to obtain management control of Avis.

Thus, the combination of the lock-in Proposals and the proposed secondary offering will cause irreparable damage to Fuqua. If Fuqua is unable to either obtain 47% of the common stock of Fuqua or, having obtained such a percentage, is unable to obtain management control, its damages will not be ascertainable. It is therefore entitled to injunctive relief. Treasure Valley Potato Bargaining Assoc. v. Ore-Ida Foods, Inc., 497 F.2d 203, 218 (9th Cir. 1974) cert. denied 419 U.S. 999 (1974).

Further, this Court may take account of the irreparable damage to the Miller and Prather plaintiffs and other Avis stockholders should the proposed secondary offering go forward. Should the secondary offering go forward, the Avis stockholders will lose the benefit of the Fuqua offer and any other offers that might be made should Trustee Order No. 3 be amended. Because the amount that would be received by Avis stockholders from possible future offers is not ascertainable, the damages to the stockhold-

ers are likewise not ascertainable and the stockholders are therefore entitled to injunctive relief.*

C. This Court Should Enjoin the Proposed Secondary Offering

While Fuqua submits that the District Court erred in denying its request for injunctive relief, this Court must deal with the situation currently before it. The lock-in Proposals have been adopted at the Annual Meeting and the Trustee is about to proceed with the proposed secondary offering. As discussed above (Point II (C)), under Hurwitz v. Directors Guild of America, Inc., 364 F.2d 67 (2d Cir. 1966), cert. denied 385 U.S. 971 (1966) and other authority, this Court possesses plenary power herein. Whether or not it directs at this time that Trustee Order No. 3 should be amended, it should direct that the proposed secondary offering be enjoined. Where this Court finds that changed circumstances are such that the case before it is different from that presented to the District Court, it may issue an appropriate injunction without remand to the District Court. Tri-State Generation & Transmission Assoc. Inc. v. Public Service Commn., 412 F.2d 115 (10th Cir. 1969), cert. denied 397 U.S. 1043 (1970).

A. oral argument on appellants' motions for injunctions pending disposition of the instant appeals, counsel for Avis argued that this Court could not grant such relief be-

* As discussed above (p. 19), the District Court refused to consider the Miller plaintiff's application to enjoin the proposed secondary offering.

cause it was not sought in the District Court. The above-cited authority makes clear that this was not a correct statement of the law. Further in the case of the Miller plaintiff, such relief was sought and Judge Blumenfeld's action in refusing to hear such application is reviewable herein under Hurwitz and Mercury Motor Express v. Brinke, 475 F.2d 1086 (5th Cir. 1973) (discussed supra at p. 58). In the interest of judicial economy, this Court may consider whether Miller's application to enjoin the secondary offering should be granted rather than requiring Miller to bring on a motion by means of notice of motion in the District Court and then to reappear in this Court two weeks later when said motion is denied.

In the case of Fuqua and Prather, these parties first learned of the secondary offering on May 18 when their initial applications for orders to show cause were made to Judge Blumenfeld. Having learned of the secondary offering and Judge Blumenfeld's action in striking that portion of Miller's proposed order to show cause which sought to enjoin it, these parties were faced with two alternatives. They could make the vain gesture of seeking to amend their orders to show cause to enjoin the secondary offering* or they could seek such relief in this Court. Again, no useful purpose would be served either at the time or now by a futile application to the District Court.

* The futility of an application to the District Court to enjoin the secondary offering is underscored by Judge Blumenfeld's statement that "it is unlikely that this Court would order the Trustee to accept the [Fuqua] offer" (272a).

Further the fundamental reason why neither Fuqua nor Prather were aware of the secondary offering until May 18 was the action of Avis in not including a reference to the secondary offering in the Proxy Statement. As discussed above (pp. 8-10), Avis was well aware by the time of the issuance of the Proxy Statement that the secondary offering would take place. Having failed to include this material fact in the Proxy Statement, Avis should not now be permitted to benefit from its wrongdoing by charging Fuqua and Prather with failing to attempt to enjoin the offering at an earlier date.

The present posture of this matter can be summarized by counsel for Avis' statement before the District Court that if Fuqua did not prevail in its application "he can come back and he'll be just as welcome as he was initially" (248a). The Trustee and Avis have made it unmistakably clear that Fuqua is not welcome and that they will use Trustee Order No. 3 to bar Fuqua's offer and any other offer to purchase the Trust Property no matter how beneficial such offers may be to Avis and its stockholders.

Further, the Trustee and Avis by enactment of the lock-in Proposals at the Annual Meeting have taken the first step toward assuring that even should Trustee Order No. 3 be amended, no offer for purchase of the Trust Property as a block can be made. This Court should not permit them to take the final step necessary to frustrate offers to purchase the Trust Property; the proposed secondary offering. There is no necessity that the

secondary offering go forward. However, should it occur, it will cause irreparable harm to Fuqua, Avis and the Avis stockholders.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Court should order that Fuqua's motion to intervene be granted; that Trustee Order No. 3 should be amended to permit sale of the Trust Property to Fuqua, or alternatively that this matter be remanded to the District Court for an evidentiary hearing as to whether Trustee Order No. 3 should be amended; and that the proposed secondary offering should be enjoined.

Respectfully submitted,

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By

J. Young

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This

1st day of June

19

Whitman & Ransom

Atty. for

by R. Mante